APPENDIX J

FILED
MAR 31 1998

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GREGORY DEAN CALIENDO, Defendant and Appellant.	B107229 (Super. Ct. No. PA020568

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles L. Peven, Judge. Conviction affirmed; sentence is affirmed as modified.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, James William Bilderback II and Sergio Bent, Deputys Attorney General, for Plaintiff and Respondent.

SUMMARY

Here we affirm appellant's second degree burglary conviction based upon his capture inside a car he had broken into. While a prosecution witness and several jurors erred by conversing with one another, prejudice was neither presumed nor shown because the conversation did not pertain to the trial, the facts of the case, the parties or participants, or the witness's credibility. The trial court properly prevented the arresting officers from testifying to a statement made by appellant as he got out of the car—the statement was hearsay, did not qualify for admission as an excited utterance or contemporaneous declaration, and was not being introduced for purposes of impeachment. Because CALJIC 2.90 accurately defines reasonable doubt for the jury, the trial court properly used it to instruct the jury. The Three Strikes Law's requirement that the prosecutor plead and prove all prior serious or violent felony convictions does not violate the state Constitution's separation of powers provision, and the law's specification of longer sentences for recidivists whose current offenses are not serious or violent felonies violates neither due process nor equal protection principles.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's first trial ended in a mistrial after jury deadlocked.

The evidence at the second trial is summarized as follows:

Kevin Gannon parked and locked his GMC Suburban in a park and ride lot at the intersection of San Fernando Road and Sierra Highway on the morning of July 20, 1995. At approximately 12:30 a.m. on July 22, Sheriff's Deputies Stairs and Okimoto drove past the parking area and noticed someone sitting in the Suburban's passenger seat. When they looked inside the car, they saw appellant lying on the floor with his head underneath the dashboard and a screwdriver in his hand. The "wind wing" window on the passenger side was broken.

After appellant got out, the officers found the screwdriver, a large rock on the floor on the passenger's side, and broken glass on the floor, seat, and the knees of appellant's pants. The doors on the passenger side were unlocked, while those on the driver's side were locked. After determining that appellant was not the car's owner, the deputies arrested appellant and impounded the car.

Gannon called the sheriff's office when he returned to the park and ride lot on July 22 and could not find his car. When he was shown his car in the impound lot, Gannon noticed that the window was broken, one speaker had been unscrewed, and the sun visors, light bar and a red overnight bag containing clothing and about $30 were missing from the car.

On July 24, 1995, Detective Mundell interviewed appellant, who said that at about 11 p.m., his wife, who was angry with him, dropped him off at San Fernando Road and Sierra Highway. He got cold and needed a place to sleep, so he broke the Suburban's window, unlocked the door, and then entered the car and went to sleep. He denied having a screwdriver in his hand when the deputies contacted him.

Just after the jury began deliberating, defense counsel noticed several jurors talking to Detective Mundell in the hallway "for approximately 15 Minutes." Outside of the presence of the jury, Mundell admitted that he had conversed with one to three jurors after one of the jurors stated, "You're awfully busy in here." Mundell told the court that he and the jurors had not discussed anything pertaining to the case, the defendant, the attorneys, or the court, and that they had instead discussed how busy he was, "Cooperstown, baseball, small towns,....a lot of small talk but nothing to do with this case...."

When the court asked of the jury which jurors had talked to Mundell, three jurors admitted doing so. Each of the jurors denied talking about the trial, the facts of the case, the

witnesses, the evidence, the defendant, the attorneys, the judge, or "anything whatsoever that anybody could say is any discussion about the case or any of the parties connected with the case." Juror 4 told the court that he and Mundell had talked about baseball, the cost of eating at the courthouse, the juror's neighbor, and "that he's doing such a good job as an officer; in other words, I wouldn't want to be in his possession [sic] to be a cop or officer." Juror 5 told the court that he talked to Mundell about the amount of paperwork Mundell had to do and Mundell's exercise regimen. Juror 22 (sitting as juror number 9) said that she had only asked Mundell how long he thought it would be before the jury was let back into the courtroom.

The court asked if any other jurors had overheard the conversation between Mundell and any of their fellow jurors, and several indicated that they had. The court asked each juror individually whether he or she had heard anything other than what the other jurors had reported. Each juror said that they had not, except for jurors 8 and 11, who said they heard something abut gym equipment. The court then asked each juror individually whether the conversations between Mundell and the jurors would influence his or her judgment in the case. Each juror said that his or her judgment would not be affected. The court repeated its frequent admonishment not to speak to anyone concerning any subject connected with the trial.

An apparently neutral witness to the conversation, Attorney Fefferman, told the court that he overheard "a similar conversation" about work and the effect that Mundell's presence in the court had on his colleagues' workload.

The court denied appellant's motion for a mistrial based on jury misconduct, saying that it accepted the jurors' and Mundell's representations as to the subject matter and the jurors' representations that it would not influence their judgment. Appellant later re-raised the issue in an unsuccessful motion for a new trial.

In bifurcated proceedings, the jury convicted appellant of second degree burglary. The court found that appellant had suffered two prior serious or violent felony convictions within the meaning of the Three Strikes Law, and that he had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The probation report and evidence introduced during the trial indicated that appellant, who was 36 at the time of the current offense, had suffered the following prior convictions as an adult:

Date	Crime	Sentence	History
8/13/79	Grand theft auto	3 years probation	16 months in prison following probation revocation
1/20/81	Grand theft auto	3 years probation	16 months in prison following probation revocation
10/13/81	Grand theft property	Unknown	
5/7/84	1st degree burglary	4 years	Work furlough release on 10/11/85; returned to prison 12/16/85; paroled 4/16/86; returned for parole violation on 9/24/86; paroled 1/31/88

Date	Crime	Sentence	History
5/7/84	Preventing/ dissuading a witness by threat or force	3 years concurrent with burglary sentence	(see above)
7/18/86	Trespass with injury to property	Returned to prison as parole violator	(see above)
7/18/86	Use or under the influence of controlled substance	90 days in jail	
9/10/6	2nd degree burglary	3 years	Paroled 1/31/88
5/5/89	Robbery	13 years	On parole at time of current offense

The court stayed the two prior prison term enhancements and sentenced appellant to prison for 25 years to life.

Appellant contends that (1) he was deprived of a fair trial by a conversation between several jurors and a prosecution witness; (2) the trial court erred in excluding evidence of a statement he made to the deputies who removed him from the Suburban; (3) the reasonable doubt instruction was unconstitutionally ambiguous; (4) the Three Strikes Law violates the separation of powers provisions of the California Constitution; (5) the Three Strikes Law violates due process and equal protection principles; and (6) his 25-years-to-life sentence constitutes cruel and/or unusual punishment. Respondent

contends that the trial court erred in staying the prior prison term enhancements, and requests a remand.

DISCUSSION

1. The trial court did not err in denying appellant's motions for mistrial and new trial on the ground of jury misconduct. As an initial matter, appellant contends that the court violated Evidence Code section 1150 by questioning the jurors about whether the conversation with Mundell would influence their judgment. However, in *People v. Cooper* (1991) 53 Cal.3d 771, 838, the Supreme Court upheld just this sort of inquiry, saying that section 1150 applies only to post-verdict inquiries.

When a juror violates his oath as a juror, doubt is cast upon that person's ability to otherwise perform his or her duties. (*People v. Cooper, supra,* 53 Cal.3d at pp. 835-836.) Here, however, because the jurors' conversation with Detective Mundell concerned subjects that were unconnected with the trial, they did not violate their oath[1] or the court's instructions, pursuant to Penal Code section 1122, not to speak to anyone on "any subject connected with the trial." Thus, while the conversation between the jurors and Mundell was improper and fraught with the danger of improper influence and communication of extraneous information, it did not reflect adversely upon the jurors' abilities to carry out their duties.

In *People v. Cobb* (1955) 45 Cal.2d 158, the Supreme Court held that no presumption of prejudice arose from the mere fact that a juror had a private communication with a relative of the accused on a topic unrelated to the trial. (*Id.* at p. 161.)

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1. Pursuant to the requirements of Code of Civil Procedure section 232, subdivision (b), the jurors agreed to "well and truly try the cause now pending before this court, and a true verdict render therein according only to the evidence presented ... and to the instructions of the court."

Without mentioning *Cobb*, the court in *People v. Ryner* (1985) 165 Cal.App.3d 1075, upon which appellant relies, held that a presumption of prejudice arose even where the subject of the conversation between a juror and a prosecution witness was unrelated to the pending case. (*Id.* at p 1082.) Since *Cobb* has not been overruled, we are bound to apply it and to disregard the contradictory holding of *Ryner.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450. See *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1485 [rejecting *Ryner* as inconsistent with *Cobb* and holding that no presumption of prejudice arose from a prosecution witness's conversation with a juror regarding matters unrelated to the case being tried].) Accordingly, we do not presume any prejudice from the incident.

Appellant has suggested a number of potentially prejudicial effects Mundell's conversation might have had, but the record as a whole discloses no reasonable probability of actual harm to appellant. Juror 22's question was a trivial inquiry regarding the court's hours. Juror 4 explained the intent of his comment that Mundell was "doing such a good job as an officer" to mean that Juror 4 would not want to have Mundell's job. Thus, rather than expressing admiration for Mundell, the juror was simply saying that police work was necessary, but unenviable. No topic discussed by Mundell and Jurors 4 or 5 and any tendency to reflect upon or bolster Mundell's credibility, and every juror said that he or she would not be influenced by the conversation between Mundell and members of the jury. Appellant argues that, pursuant to *Ryner*, the jurors' statements must be disregarded. However, the *Ryner* court's decision to ignore the jurors' statements was based on its belief that Evidence Code section 1150 prohibited the consideration of such statements, even though they were made prior to the verdict. As previously noted, *Cooper* rejected this proposition. (*People v. Cooper, supra,* 53 Cal.3d at p. 838.)

2. The court properly excluded appellant's hearsay statement to the deputies. The prosecutor succeeded in excluding as hearsay appellant's statement to Deputies Stairs and Okimoto that he had not broken into the Suburban. After the case had gone to the jury, appellant made an offer of proof that the deputies would have testified that appellant made the statement as he got out of the Suburban. In the trial court appellant argued that the statement was admissible as a spontaneous declaration, a contemporaneous declaration, evidence of his state of mind, and a prior inconsistent and consistent statement. Appellant now contends that the testimony would have been admissible pursuant to Evidence Code section 1202, 1240, and 1241.

Evidence Code section 1202 permits the admission, for impeachment only, of an inconsistent statement by the declarant of a hearsay statement which has been admitted in evidence. The purpose of this rule is fairness to the party against whom the hearsay evidence was admitted, to compensate for the lack of an opportunity to cross-examine the declarant. (*People v. Ross* (1979) 92 Cal.App.3d 391, 406.)

Appellant essentially argues that he was entitled to impeach himself by having the deputies testify to his statement which contradicted the statement that Detective Mundell would later testify that appellant had made, i.e., that appellant had broken into the car. In addition to the fact that appellant's admission to Mundell was not yet in evidence, appellant's desire to impeach himself belies his true intent: to introduce the statement to prove that he did not break into the car. Because evidence admitted pursuant to section 1202 is limited in use to impeachment, the statute provides no basis for admission of the testimony in issue.

Evidence Code section 1240 establishes a hearsay exception for a statement which (1) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant

and (2) was made spontaneously while the declarant was under the stress of excitement caused by such perception. Appellant's statement to Stairs and Okimoto does not purport to describe, narrate, or explain a *perceived* act, condition, or event, but instead simply described his own conduct. Furthermore, it was not made under the stress of excitement caused by the explained act or event, which in this case would be appellant's entry into the Suburban. Appellant improperly attempts to shift the source of "excitement" to being caught in the vehicle. However, section 1240 expressly requires that the "excitement" be caused by the perception of the act, condition, or event which the statement purports to describe, etc.

Similarly, the statement was not admissible pursuant to Evidence Code section 1241, which provides a hearsay exception for a statement which (1) was made while the declarant was engaged in particular conduct and (2) is offered to explain, qualify, or make understandable that conduct. Appellant's statement about how he got into the Suburban was not made while he was getting into the car, but after he was ordered out of it by the deputies.

3. The trial court properly instructed the jury regarding reasonable doubt. Appellant contends that the reasonable doubt instruction, CALJIC 2.90,[2] violated due process because it failed to define "an abiding conviction." We have repeatedly rejected such contentions (see, e.g., *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572; *People v. Torres* (1996) 43 Cal.App.4th 1073, 1077-1078; see also, *People v. Tran* (1996)

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2. In relevant part, CALJIC 2.90 provides as follows: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

47 Cal.App.4th 253, 262-263.) For the reasons stated in these cases, appellant's claim has no merit.

4. The Three Strikes Law does not violate the separation of powers provision of the state Constitution. Appellant contends that the Three Strikes Law's requirement that the prosecutor plead and prove all prior serious or violent felony convictions usurps prosecutorial discretion and therefore violates the separation of powers principle set forth in article I, section 3 of the California Constitution. Division 4 of this court rejected an identical contention in *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332-1333, which we find persuasive.

5. The Three Strikes Law does not violate due process or equal protection principles. Appellant contends that the Three Strikes Law violates due process and equal protection principles by irrationally and arbitrarily imposing longer sentences on persons whose crimes are of decreasing severity than on those whose crimes are escalating in severity.

In the exercise of its police power, the legislature does not violate due process by enacting a statute which is procedurally fair and reasonably related to a proper legislative goal. (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 78; *People v. Cooper* (1996) 43 Cal.App.4th 815, 829.) The wisdom of legislation, the availability of less drastic remedial alternatives, and the failure to solve all related ills at once are inconsequential to this analysis. (*Hernandez, supra,* at p. 78; *Cooper, supra,* at p. 829.) Moreover, penal sanctions need not be perfectly structured so that all degrees of culpability are placed in their proper position in a continuum of penalties. (*Ibid.*) Application of the Three Strikes Law to everyone previously convicted of one or more serious or violent felonies who commits any new felony, without regard to whether the new offense is more or less serious than the prior offenses, is rationally related to the legitimate governmental goal of discouraging recidivism. (*Ibid.*; *People v. Kilborn, supra* 41

Cal.App.4th at pp. 1328-1330.) Accordingly, the law does not violate due process.

With respect to his equal protection claim, appellant has failed to show the threshold prerequisite: unequal treatment of persons who are similarly situated. (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) A defendant convicted of one crime is not similarly situated to a defendant convicted of a different crime (*People v. Jacobs* (1984) 157 Cal.App.3d 797, 800, 803), and a recidivist previously convicted of a serious or violent felony is not similarly situated to a recidivist previously convicted of a nonserious, nonviolent felony, in that the former has previously demonstrated a much greater danger to society than the latter. (*People v. Cooper, supra,* 43 Cal.App.4th at p. 828.) Thus, the alleged disparities between the Three Strikes Law's effect on appellant and his hypothetical escalating recidivist do not implicate the equal protection clause. (*Id.* at pp. 828-830; *People v. Kilborn, supra,* 41 Cal.App.4th at pp. 1330-1332.)

6. The length of appellant's sentence does not violate the federal or state constitution. Appellant also contends that his 25-years-to-life sentence violates both the Eighth Amendment and article I, section 17 of the California Constitution. Traditionally, Eighth Amendment proportionality analysis focused upon the gravity of the offense and harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdiction. (*Solem v. Helm* (1983) 463 U.S. 277, 292.) However, *Harmelin v. Michigan* (1991) 501 U.S. 957, which contained no majority opinion, cast doubt on the continuing validity of a proportionality challenge in a non-capital case. Two justices concluded the Eighth Amendment contains no proportionality guarantee (*id.* at p. 965 [opn. of Scalia, J.]) and three other justices concluded the amendment forbids only those sentences which are "grossly disproportionate" to the crime (*id.* at p. 1001 [opinion of Kennedy, J.]). Even those justices recognizing a guarantee of

proportionality review stressed that, outside the context of capital punishment, successful challenges to particular sentences are "exceedingly rare" because of the "relative lack of objective standards concerning terms of imprisonment." (*Ibid.*)

Under the Three Strikes Law, defendants are punished not just for their current offense but for their recidivism. *Rummel v. Estelle* (1980) 445 U.S. 263, recognized that recidivist felons pose a danger to society which justifies the imposition of lengthy sentences for even relatively minor subsequent offenses. (*Id.* at p. 284.) The court noted that the length of and prerequisites for imposition of such a sentence are largely within the punishing jurisdiction's discretion. (*Id.* at pp. 284-285.) Therefore, even if the Three Strikes Law punishes more severely than other recidivist measures, such severity does not render the punishment grossly disproportionate to the crime. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1005; *Rummel v. Estelle, supra,* 445 U.S. at pp. 284-285.)

The basic test of a cruel or unusual punishment under the California Constitution is whether it is so disproportionate to the crime as to shock the conscience and offend the fundamental notions of human dignity. (*People v. Dillon*, (1983) 34 Cal.3d 441, 478; *In re Lynch* (1972) 8 Cal.3d 410, 424.) The main technique of analysis is to examine the nature of the offense and of the offender. (*Dillon,* at p. 479.) The court must consider both the nature of the offense in the abstract, and the facts of the crime in the particular case, including factors such as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences. (*Ibid.*) With respect to the nature of the offender, the question is whether the punishment is "grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Here, appellant's Three Strikes sentence was predicated on his current felony conviction, coupled with prior robbery and burglary convictions. (Pen. Code, § 1170.12, subd. (b)(1).) Appellant also had prior convictions for grand theft auto (two), grand theft property, preventing or dissuading a witness by threat or force, trespass with injury to property, second degree burglary, and using or being under the influence of a controlled substance. He had spent many years in prison and was on parole for the 1989 robbery conviction at the time he committed the current offense. Appellant's long history of recidivism, coupled with his current offense, justify the term imposed.

7. The trial court erred in failing to either strike or impose the Penal Code section 667.5, subdivision (b) enhancements. The only authorized procedure for not imposing sentence on a prior prison term enhancement is to strike it. (*People v. Jones* (1992) 8 Cal.App.4th 756, 758.) We construe the the trial court's stay of the enhancements as expression of its intent that appellant not serve the additional terms.

DISPOSITION

The judgment is modified by striking the two stayed Penal Code section 667.5, subdivision (b) enhancements. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

NEAL. J.

We concur:

LILLIE, P.J.

WOODS, J.

APPENDIX K

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VAN NUYS, CALIFORNIA; THURSDAY, AUGUST 8, 1996
1:30 P.M.

DEPARTMENT NV-C HON. CHARLES L. PEVEN, JUDGE

APPEARANCES:

THE DEFENDANT, GREGORY DEAN CALIENDO, WITH HIS COUNSEL, JOANNE HARROLD, ATTORNEY AT LAW; JANE WINSTON, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA; AND ROBERT A. FEFFERMAN, DEPUTY PUBLIC DEFENDER OF LOS ANGELES COUNTY.

(WENDY SCHRIVER, CSR #7271, OFFICIAL REPORTER.)

(AT 2:10 P.M. THE JURY RETIRED TO RESUME THEIR DELIBERATIONS, AND AT 2:30 P.M. THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE JURY:)

THE COURT: WE'RE BACK ON THE RECORD IN THE CASE OF PEOPLE VERSUS CALIENDO. LET THE RECORD REFLECT MR. CALIENDO IS PRESENT IN COURT WITH HIS COUNSEL. THE PEOPLE ARE REPRESENTED. THE JURY IS NOT IN THE COURTROOM AT THIS TIME.

MS. HARROLD, I UNDERSTAND THAT YOU WANTED TO BRING SOMETHING TO THE ATTENTION

OF THE COURT THAT I'VE JUST LEARNED FROM MRS. BLAND.

MS. HARROLD: THAT IS CORRECT, YOUR HONOR. DURING THE NOON RECESS I WAS IN THE CAFETERIA. NUMEROUS JURORS WERE IN THE CAFETERIA. I OBSERVED A LARGE GROUP OF THEM LEAVE AT APPROXIMATELY 1:15 BY THE CAFETERIA CLOCK.

APPROXIMATELY 15 TO 20 MINUTES AFTER THE JURORS HAD LEFT THE CAFETERIA, MYSELF, MRS. CALIENDO, MY ASSOCIATE, MS. MAC DONALD, ALL CAME UP TO THIS FLOOR INTENDING TO COME TO THIS COURTROOM, ASSUMING THAT THE JURY HAD ALREADY ENTERED THE JURY ROOM.

WHEN WE ARRIVED AFTER COMING OFF OF THE ELEVATORS WE SAW THAT OFFICER MUNDELL WAS TALKING WITH OUR JURORS. NEEDLESS TO SAY, I WAS EXTREMELY SHOCKED QUITE FRANKLY BY WHAT I WAS SEEING. I STAYED DOWN BY THE ELEVATORS AWAY FROM THE JURORS, BUT I HAD A CLEAR VIEW OF MY JURORS, AND WE WERE STANDING THERE. THAT OCCURRED FOR APPROXIMATELY 15 MINUTES. HOW LONG THAT HAD BEEN GOING ON I DO NOT KNOW. BUT I KNOW THAT I CAN POINT TO SPECIFIC JURORS THAT I SAW SOME TYPE OF CONVERSATION GOING ON. I SAW THAT THERE WAS LAUGHING AND CAMARADERIE, SOME TYPE OF CONVERSATION GOING ON.

I ASKED THE GENTLEMAN TO MY RIGHT – I DON'T KNOW THIS NAME. I KNOW HE'S A LAWYER.

THE COURT: MR. FEFFERMAN.

MS. HARROLD: I ASKED MR. LETTERMAN –

THE COURT:"FEFFERMAN."

MS. HARROLD: – FEFFERMAN. I'M SORRY. I ASKED MR. FEFFERMAN IF HE KNEW WHERE DETECTIVE MUNDELL WAS. HE DID NOT KNOW WHO DETECTIVE MUNDELL WAS. I ASKED ABOUT THE GENTLEMAN WHO WAS STANDING NEXT TO HIM BECAUSE MR. FEFFERMAN WAS ALSO WAITING FOR THE COURTROOM TO OPEN. AND I EXPLAINED WHO OFFICER MUNDELL WAS BECAUSE HE WAS STANDING THERE, AND I ASKED HIM IN REGARDS TO WHAT PARTS OF THE CONVERSATION HE HEARD BETWEEN OFFICER MUNDELL AND MY JURORS, AND HE INDICATED TO ME THAT PART OF WHAT HE WAS HEARING IN REGARDS TO THE CONVERSATION HAD TO WITH WORKLOAD.

I FIND IT OUTRAGEOUS THAT AN OFFICER OF EIGHT YEARS, INVESTIGATING OFFICER, IS OUT THERE TALKING TO THE JURY ON A CRIMINAL CASE. THAT IS, QUITE FRANKLY, UNBELIEVABLE. I AM ASKING THAT HIS TESTIMONY BE STRUCK. I AM ASKING THAT THE JURY BE INFORMED THAT THIS IS MISCONDUCT, AND I'M ASKING THAT THE COURT TAKE SOME TYPE OF APPROPRIATE SANCTIONS AGAINST OFFICER MUNDELL. THERE MAY BE OTHER ADDITIONAL SANCTIONS; WHETHER MISTRIAL OR WHATEVER, I DON'T KNOW.

THE COURT: ARE YOUR ASKING FOR A MISTRIAL?

MS. HARROLD: I WANT TO LOOK AT THE LAW TO SEE WHAT THE LAW IS. AS I'M SAYING, I'VE WORKED COURTS A LONG TIME. I HAVEN'T SEEN THIS. I AM USED TO IF A WITNESS OR AN OFFICER IS APPROACHED, HE MERELY INFORMS THEM, "I'M SORRY. I CANNOT TALK TO YOU WHILE THE CASE IS

PENDING," AND WALK AWAY. I'M NOT USED TO WATCHING FOR 15 MINUTES WHILE AN OFFICER, A WITNESS, IS TALKING WITH THE JURY.

THE COURT: MS. WINSTON, DO YOU HAVE ANYTHING TO OFFER?

MS. WINSTON: YES. ONLY AS TO WHAT I SPOKE TO – I DIDN'T KNOW ANYTHING ABOUT THIS UNTIL I WALKED IN HERE THIS AFTERNOON. APPARENTLY I SPOKE WITH DETECTIVE MUNDELL, WHO AS YOU KNOW, AS HE TESTIFIED, THIS WAS HIS THIRD JURY TRIAL. SO HE HAD LISTENED TO THE JURY INSTRUCTIONS THIS MORNING WHEN HE WAS SITTING THERE AND HE HAD HEARD THE ONE ABOUT, "DO NOT TALK AMONG YOURSELVES ABOUT THE CASE EXCEPT WHEN YOU'RE IN THE JURY ROOM." SO HE HEARD THAT ABOUT THE CASE, AND I THINK HE MISUNDERSTOOD AND REALLY DIDN'T QUITE KNOW – HE KNEW HE WASN'T SUPPOSED TO TALK ABOUT THE CASE, AND HE TOLD ME SOMEBODY APPROACHED HIM FROM THE JURY AND SAID SOMETHING TO HIM ABOUT, "ARE YOU BUSY?" OR "YOU LOOK BUSY," OR "HAVE YOU BEEN BUSY?" AND THAT APPARENTLY WAS THE WORKLOAD CONVERSATION. I DON'T KNOW THE SUM AND SUBSTANCE OF ANYTHING FURTHER.

ACCORDING TO DETECTIVE MUNDELL, THEY DID NOT TALK ABOUT THE CASE, AND HE DID NOT WANT TO BE RUDE TO ANYBODY AS HE WAS WAITING OUT THERE. HE WAS GOING TO COME IN AND WATCH WHAT WAS GOING ON IN THE COURTROOM THIS AFTERNOON WHILE HE WAS WAITING. SO HE APOLOGIZES. HE DIDN'T REALIZE THAT HE WASN'T SUPPOSED TO HAVE EVEN A BENIGN CONVERSATION

WITH ANYBODY, BUT HE DID NOT DISCUSS THE CASE.

I BELIEVE THE COURT SHOULD PROBABLY ADMONISH THE JURY THAT THEY SHOULD NOT BE APPROACHING AND TALKING TO – AND UNFORTUNATELY DETECTIVE MUNDELL SHOULD HAVE KNOWN THAT, SHOULD HAVE KNOWN TO JUST STAY A DISTANCE AWAY FROM THE JURY IN ORDER TO AVOID THAT. I BELIEVE IF MS. HARROLD IS ASKING FOR A MISTRIAL, THE APPROPRIATE TIME WOULD BE TO ASK FOR IT AND LET YOU RULE ON IT NOW BEFORE THE JURY DELIBERATES ANY FURTHER.

THE COURT: THAT'S WHAT I WAS TRYING TO FIND OUT FROM MS. HARROLD, WHAT IT IS YOU'RE ASKING ME TO DO. YES, I WILL CERTAINLY ADMONISH THE JURORS. I WILL BRING THEM IN. I CERTAINLY WILL ADMONISH THEM NOT TO DISCUSS THE CASE WITH ANYBODY ELSE. ANY CONVERSATION THEY HAD WITH – I'M GOING TO ASK THEM IF ANY OF THEM HAD A CONVERSATION WITH DETECTIVE MUNDELL REGARDING ANY OF THE FACTS OF THIS CASE, IF ANY DISCUSSION WAS HELD WHATSOEVER REGARDING ANY OF FACTS, ANY OF PARTIES IN THIS CASE. I'M GOING TO ASK MR. MUNDELL HERE IN A MINUTE MYSELF, BUT I CAN ADMONISH THEM AND I INTEND TO DO THAT. BUT I WANT TO KNOW WHAT YOU WANT ME TO DO.

ASIDE FROM THAT, I'M NOT INCLINED TO STRIKE HIS TESTIMONY, MS. HARROLD, NO. YOU CAN MAKE A MISTRIAL MOTION, MAKE IT – I WOULD LIKE TO GET SOME FURTHER INFORMATION. FIRST OF ALL, CERTAINLY IF THERE IS ANY INDICATION THAT THERE WAS DISCUSSION BY MUNDELL WITH ANY OF

THE JURORS REGARDING ANY OF THE FACTS OF THIS CASE, THE PARTIES IN THE CASE, I CERTAINLY WILL BE RECEPTIVE TO A MISTRIAL MOTION IF YOU WISH TO MAKE ONE.

MS. HARROLD: YES, YOUR HONOR. I WOULD LIKE TO HEAR FURTHER FROM OFFICER MUNDELL. I WOULD LIKE TO HEAR FURTHER IN REGARDS TO THE JURORS.

THE COURT: WELL, I INTEND TO CALL THEM OUT IN A MOMENT.

MS. HARROLD: ONE OF THE THINGS IN REGARDS TO OFFICER MUNDELL, I WOULD LIKE THE COURT IN ITS DISCUSSIONS AND ADMONISHMENT WITH THE JURY TO POINT OUT THAT IT'S OFFICER MUNDELL WHO CREATED THE PROBLEM FROM THE STANDPOINT OF IT WAS MISCONDUCT. I DON'T WANT THE JURORS TO FEEL THAT THE COURT IS PENALIZING OR CRITICIZING THEM. OFFICER MUNDELL, HE'S A DETECTIVE. HE'S BEEN WITH THE SHERIFF'S DEPARTMENT EIGHT YEARS. I WOULD LIKE THE JURORS TO KNOW THAT IT'S OFFICER MUNDELL WHO IS THE ONE WHO DID THE MISCONDUCT.

THE COURT: WELL, I'LL SPEAK TO THE JURORS.

MR. MUNDELL, WHY DON'T YOU COME UP HERE FOR JUST A SECOND.

MR. MUNDELL: DO YOU WANT ME TO TAKE THE STAND?

THE COURT: NO, YOU DON'T HAVE TO. YOU CAN STAY RIGHT THERE. YOU'RE UNDER OATH. YOU'RE

ALREADY UNDER OATH FROM BEFORE SO YOU REMAIN UNDER OATH.

ALL RIGHT. NOW, YOU'VE HEARD ALL THIS THAT WAS REPORTED. YOU HEARD WHAT MS. HARROLD WAS JUST SAYING. SHE SAW YOU APPARENTLY OUTSIDE THE COURTROOM HERE HAVING SOME TYPE OF DISCUSSION WITH AT LEAST SOME OF THE JURY PANEL. I DON'T KNOW HOW MANY. WERE YOU SPEAKING WITH SOME OF THE JURORS OUTSIDE IN THE HALLWAY BEFORE OUR AFTERNOON SESSION HERE?

MR. MUNDELL: YES.

THE COURT: OKAY. HOW MANY JURORS APPROXIMATELY WERE YOU SPEAKING WITH?

MR. MUNDELL: PRIMARILY ONE. TWO OR THREE – TWO WERE STANDING BEHIND HIM AND THEY COLLECTIVELY MENTIONED – OR ONE MENTIONED WHICH SET OFF ANOTHER ONE, YOU KNOW, "YOU'RE AWFULLY BUSY IN HERE."

AND I SAID, "YES, I AM A BUSY PERSON."

AND THE OTHER TWO KIND OF DISAPPEARED, AND THE ONE MALE SPOKE WITH ME FOR APPROXIMATELY 10 MINUTES WHILE WE WERE WAITING TO COME INTO THE COURTROOM, AND WE DID NOT DISCUSS ANYTHING ABOUT THIS CASE.

THE COURT: THAT'S MY QUESTION.

MR. MUNDELL: WE DID NOT EVEN COME CLOSE –

THE COURT: WAS THERE ANY DISCUSSION WHATSOEVER –

MR. MUNDELL: ABSOLUTELY NOT.

THE COURT: – BETWEEN YOU AND ANY OF THE JURORS, ANY OF THE JURORS, REGARDING ANY OF THE FACTS OR ANYTHING AT ALL ABOUT THIS CASE?

MR. MUNDELL: ABSOLUTELY NOT.

THE COURT: WAS THERE ANY DISCUSSION ABOUT ANY OF THE PARTIES, MR. CALIENDO, EITHER LAWYER, THE JUDGE, ANYTHING AT ALL ABOUT THE COURT PROCEEDINGS THAT TOOK PLACE IN THIS CASE OVER THE LAST THREE, FOUR – THIS IS THE FOURTH DAY NOW WE'VE BEEN ENGAGED IN THIS – OVER THE LAST FOUR DAYS? ANYTHING DISCUSSION WHATSOEVER IN THAT REGARD?

MR. MUNDELL: ABSOLUTELY NOT.

THE COURT: SO WHAT YOU'RE TELLING ME IS THAT ONLY DISCUSSION YOU HAD WAS ABOUT YOUR WORKLOAD?

MR. MUNDELL: THE WORKLOAD. I DON'T KNOW. WE TALKED ABOUT COOPERSTOWN, BASEBALL, SMALL TOWNS. WE TALKED ABOUT A LOT OF SMALL TALK BUT NOTHING TO DO WITH THIS CASE OR ANY OF THE DEFENDANTS OR ANY PARTIES OR ANYTHING ABOUT THIS BUILDING. WE DID NOT HAVE ANY DISCUSSIONS ABOUT THAT WHATSOEVER.

THE COURT: OKAY. NOW, YOU REALIZE THE PROBLEM YOU CAUSED, RIGHT?

MR. MUNDELL: RIGHT. I WAS REPRIMANDED THERE BY THE DISTRICT ATTORNEY, AND SHE MADE ME FULLY AWARE OF MY STUPIDITY.

THE COURT: FIRST OF ALL, YOU KNOW WHY YOU'RE HERE. YOU HAVE A RIGHT TO BE HERE IF YOU WANT TO BE HERE. NORMALLY MOST INVESTIGATING OFFICERS AFTER THE CASE IS SUBMITTED TO A JURY WILL LEAVE, GO ABOUT THEIR BUSINESS, MAYBE KEEP IN CONTACT WITH THE PROSECUTOR OR THE COURT AS TO WHAT THE OUTCOME OF THE CASE IS, BUT YOU'RE HERE. SO BE IT. BUT YOU UNDERSTAND WHAT YOU'RE DOING HERE? YOU'RE NOT PERMITTED TO SPEAK TO THE JURY. YOU'RE JUST NOT TO DO THAT. YOU'RE NOT TO HAVE ANY DISCUSSION WITH ANY OF THE JURORS. DO YOU UNDERSTAND THAT?

MR. MUNDELL: I UNDERSTAND IT NOW, YES.

THE COURT: YOU HAD NO IDEA BEFOREHAND THAT YOU SHOULDN'T SPEAK TO A JUROR?

MR. MUNDELL: I WAS LISTENING TO THE JURY INSTRUCTIONS, AND IT WAS MY UNDERSTANDING AS LONG AS THEY WERE NOT TALKING TO ME OR ANY OTHER JUROR ABOUT THE CASE, THEN IT WAS OKAY TO SPEAK WITH THEM. AND I WASN'T GOING TO – IF SOMEBODY COMES UP AND TALKS TO ME OVER AND ABOVE ANYTHING, I'M NOT GOING TO BE RUDE TO THEM AND SAY, "I'M NOT GOING TO TALK TO YOU."

THE COURT: WELL, THAT'S BASICALLY WHAT YOU HAVE TO DO. YOU CAN SAY, "I WOULD LIKE TO TALK TO YOU BUT I'M NOT PERMITTED TO SPEAK WITH YOU," AND JUST GO ABOUT YOUR BUSINESS, AND GO STEP AWAY OR GO AWAY.

MR. MUNDELL: I'M AWARE OF THAT NOW.

THE COURT: I HAD ALREADY TOLD THE JURORS THE JURORS SHOULD NOT BE APPROACHING YOU ALSO, AND I HAD ALREADY HAD SOME DISCUSSION WITH THEM IN THAT REGARD, BUT THEY DON'T PAY ATTENTION SOMETIMES EITHER. ALL RIGHT. I'LL ACCEPT YOUR REPRESENTATION. YOU REALIZE YOU ARE UNDER OATH.

MR. MUNDELL: THAT'S THE TRUTH.

THE COURT: YOU HAD NO DISCUSSION WHATSOEVER WITH ANY OF THE JURORS ABOUT ANY OF THE COURT PROCEEDINGS IN THIS CASE?

MR. MUNDELL: NOPE. I'LL BE MORE THAN HAPPY TO POINT HIM OUT. YOU CAN BRING HIM OUT HERE AND –

THE COURT: DO YOU KNOW WHICH JUROR IT WAS THAT YOU SPOKE TO? PRIMARILY YOU SAY YOU SPOKE TO ONE JUROR, PRIMARILY.

MR. MUNDELL: YEAH. IT WAS A MALE, CURLY HAIR. I THINK HE HAD LIKE A WHITE SWEATER ON. I DON'T WHAT NUMBER HE WAS. I DON'T EVEN KNOW IF HE WAS PART OF THE JURY. I ASSUME HE WAS SINCE HE WAITED OUT HERE AND HE IDENTIFIED ME AS A BEING A POLICE OFFICER.

THE COURT: ALL RIGHT. YOU CAN TAKE YOUR SEAT. THANK YOU.

ALL RIGHT. LET'S GET THE JURORS. WE DON'T NEED THE ALTERNATES.

(THE JURORS RETURNED INTO THE COURTROOM AT 2:40 P.M., AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE COURT: LET THE RECORD REFLECT THE JURY IS BACK IN THE COURTROOM.

GOOD AFTERNOON, EVERYBODY.

THE JURY PANEL: GOOD AFTERNOON.

THE COURT: I'VE CALLED YOU OUT THERE NOW BECAUSE A SUBJECT HAS COME UP. IT'S SOMETHING THAT HAS BEEN BROUGHT TO MY ATTENTION AND I NEED TO HAVE SOME INQUIRY, SOME COLLOQUY WITH THE JURY PANEL AS A WHOLE.

IT'S BEEN BROUGHT TO MY ATTENTION THAT PRIOR TO YOU COMING IN THE COURTROOM THIS AFTERNOON TO DELIBERATE, PRIOR TO THE COURTROOM BEING OPENED UP – THIS IS AFTER THE LUNCH HOUR – THAT APPARENTLY SOME OR ALL OF YOU WERE STANDING OUTSIDE THE COURTROOM, OUTSIDE THE HALLWAY WAITING TO COME INTO THE COURTROOM, THE COURTROOM TO BE OPENED UP, THAT SOME OF YOU ON THE JURY PANEL HAD SOME DISCUSSION WITH ONE OF THE WITNESSES IN THIS CASE, DETECTIVE MUNDELL, WHO IS, OF COURSE, NOW SEATED IN THE BACK OF THE COURTROOM. YOU ALL RECOGNIZE DETECTIVE MUNDELL. AND IT'S BEEN BROUGHT TO MY ATTENTION THAT SOME OF YOU HAD SOME CONVERSATIONS WITH HIM, AND I NEED TO ASK YOU ABOUT THAT.

HOW MANY ON THE JURY PANEL HAD SOME KIND OF CONVERSATION WITH DETECTIVE MUNDELL OVER THE NOON HOUR?

(THE JURORS RESPONDED.)

THE COURT: ALL RIGHT. SO WE HAVE MR. 005, MR. 004, AND MS. 022. ONLY THE THREE OF YOU. NOBODY ELSE? NONE OF THE OTHER NINE OF YOU HAD ANY DISCUSSION WHATSOEVER WITH DETECTIVE MUNDELL? APPARENTLY NOT. DID ANY OF YOU, THE OTHER NINE OF YOU, OVERHEAR ANY OF THE CONVERSATION BETWEEN ANY THE THREE?

(THE JURORS RESPONDED.)

THE COURT: OKAY. ALL RIGHT. WE'VE GOT SEVERAL OTHER PEOPLE HERE NOW THAT OVERHEARD THE CONVERSATION.

NOW, THE QUESTION COMES UP AS TO ANY OF THIS CONVERSATION THAT YOU HAD WITH DETECTIVE MUNDELL, DID ANYBODY HAVE ANY DISCUSSION WHATSOEVER WITH HIM ABOUT THE FACTS OF THIS CASE?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: ANYBODY HAVE ANY DISCUSSION ABOUT ANYTHING THAT'S TAKEN PLACE OVER THE LAST FOUR DAYS CONCERNING THIS TRIAL WITH DETECTIVE MUNDELL?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: ANYBODY DISCUSS MR. CALIENDO OR ANY OF THE FACTS OF THE CASE, ALLEGEDLY

WHAT IT IS ALLEGED THAT HE WAS SUPPOSED TO HAVE DONE, ANY DISCUSSION ABOUT MS. HARROLD, HIS LAWYER OR THE PROSECUTOR, MS. WINSTON, OR MYSELF, OR ANYTHING WHATSOEVER THAT ANYBODY COULD SAY IS ANY DISCUSSION ABOUT THE CASE OR ANY OF THE PARTIES CONNECTED WITH THE CASE?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: ANY OF THE WITNESSES THAT MIGHT HAVE TESTIFIED, ANY OF THE EVIDENCE THAT MIGHT HAVE COME IN OVER THE LAST THREE, FOUR DAYS, DID ANY OF YOU HAVE ANY DISCUSSIONS WITH DETECTIVE MUNDELL ABOUT ANY OF THAT?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: MR. 005, WHAT WERE YOU TALKING ABOUT?

JUROR NO. 5: WE TALKED ABOUT THE AMOUNT OF PAPERWORK ON DETECTIVE MUNDELL'S DESK TOP AND HIS EXERCISE REGIME AND THE FACT THAT HE DOESN'T HAVE A TELEVISION IN HIS HOUSE WHERE HE WORKS OUT.

THE COURT: MR. 004, WHAT WERE YOU TALKING TO HIM ABOUT?

JUROR NO. 4: WE TALKED BOUT EATING, AND HE HAS TO PAY SO MUCH MONEY TO EAT HERE ALL THE TIME, AND THAT HE'S DOING A GOOD JOB AS AN OFFICER; IN OTHER WORDS, I WOULDN'T WANT TO BE IN HIS POSSESSION TO BE A COP OR OFFICER. I WAS TALKING ABOUT BASEBALL. I WAS TALKING

ABOUT MY NEIGHBOR. THAT'S IT. JUST SURFACE TALK.

THE COURT: MS. 022, WHAT WERE YOU TALKING ABOUT?

JUROR NO. 9: I ASKED HIM HOW LONG HE THOUGHT IT WOULD BE BEFORE WE GET BACK INTO COURT TO START DELIBERATING.

THE COURT: ANY OF THE REST OF YOU THAT HEARD ANY OF THE DISCUSSIONS? DID ANYBODY HEAR ANYTHING ELSE, OTHER THAN WHAT THE JURORS ARE REPORTING NOW?

(THE JURORS RESPONDED.)

THE COURT: MS. 001?

JUROR NO. 1: "001."

THE COURT: 001, SORRY. DID YOU HEAR ANY OTHER DISCUSSION, OTHER THAN WHAT'S BEING REPORTED NOW?

JUROR NO. 1: NO, I DID NOT.

THE COURT: MR. 002, DID YOU OVERHEAR ANY DISCUSSION ABOUT ANYTHING ELSE, OTHER THAN WHAT'S BEING REPORTED NOW?

JUROR NO. 2: NO.

THE COURT: MS. 003, DID YOU OVERHEAR ANY DISCUSSION AT ALL?

JUROR NO. 3: NO.

THE COURT: MR. OO6, DID YOU HEAR ANY DISCUSSION BETWEEN ANY OF THE JURORS ABOUT ANY OF THE FACTS OF THE CASE?

JUROR NO. 6: NO. I DIDN'T HEAR ANY OF THE CONVERSATION WITH THE OFFICERS.

THE COURT: AT ALL.

MR. 012, DID YOU OVERHEAR ANY OF THE CONVERSATION?

JUROR NO. 12: NO, I DIDN'T HEAR ANYTHING

THE COURT: OKAY. MR. 014.

JUROR NO. 11: NO, I DIDN'T HEAR ANYTHING

THE COURT: MS. 016, YOU INDICATED YOU MIGHT HAVE OVERHEARD SOMETHING?

JUROR NO. 10: JUST ABOUT THE GYM EQUIPMENT.

THE COURT: GYM EQUIPMENT.

MR. 020, DID YOU OVERHEAR ANY CONVERSATION?

JUROR NO. 8: ALL I HEARD WAS THE GYM EQUIPMENT.

THE COURT: GYM EQUIPMENT.

MR. 007, DID YOU OVERHEAR ANY CONVERSATION?

JUROR NO. 7: NO.

THE COURT: LET ME ASK YOU THIS. ANYBODY ON THIS JURY PANEL, THE FACT THAT YOU MIGHT HAVE HAD A DISCUSSION WITH DETECTIVE MUNDELL ABOUT WHAT IT IS YOU WERE TALKING TO HIM ABOUT OR ANY OF YOU MIGHT HAVE OVERHEARD ANY CONVERSATION BETWEEN ANY OTHER JUROR AND DETECTIVE MUNDELL, IS THAT GOING TO INFLUENCE AT ALL ANY OF YOUR JUDGMENT IN THIS CASE?

(THE JURORS ANSWERED IN THE NEGATIVE.)

THE COURT: MS. 001?

JUROR NO. 1: NO.

THE COURT: MR. 002.

JUROR NO. 2: NO.

THE COURT: MS. 003?

JUROR NO. 3: NO.

THE COURT: MR. 004, ANY DISCUSSION YOU HAVE WITH DETECTIVE MUNDELL? ARE YOU GOING TO GIVE, FOR EXAMPLE, ANY GREATER WEIGHT NOW TO HIS TESTIMONY THERE, OR ARE YOU GOING TO CONSIDER ANY OF THE CONVERSATION THAT YOU HAD WITH HIM IN JUDGING THE GUILT OR INNOCENCE OF MR. CALIENDO ON THESE CHARGES?

JUROR NO. 4: NONE WHATSOEVER.

THE COURT: MR. 005, ANY OF THE CONVERSATIONS YOU HAD WITH DETECTIVE MUNDELL, IS THAT GOING TO INFLUENCE YOUR JUDGMENT AT ALL

REGARDING HIS TESTIMONY OR ANY OTHER TESTIMONY THAT YOU HAVE HEARD IN THIS CASE?

JUROR NO. 5: NO IMPACT AT ALL.

THE COURT: WILL IT INFLUENCE YOUR JUDGMENT WHATSOEVER IN ANY RESPECT AS TO THE GUILT OR INNOCENCE OF MR. CALIENDO IN THIS CASE?

JUROR NO. 5: NO.

THE COURT: MR. 006, YOU SAID YOU DIDN'T OVERHEAR ANYTHING?

JUROR NO. 6: THAT'S CORRECT. I DID NOT.

THE COURT: MR. 012?

JUROR NO. 12: NO.

THE COURT: MR. 014?

JUROR NO. 11: I DIDN'T HEAR ANYTHING

THE COURT: MS. 016, WHATEVER IT IS YOU MIGHT HAVE OVERHEARD, TALKING ABOUT GYM EQUIPMENT, WHATEVER, OTHER JURORS TALKING TO DETECTIVE MUNDELL, IS THAT GOING TO INFLUENCE YOUR JUDGMENT AT ALL –

JUROR NO. 10: NO. SIR,

THE COURT: – IN THIS CASE?

MS. 022, WHATEVER CONVERSATION YOU HAD WITH DETECTIVE MUNDELL, IS YOUR JUDGMENT

NOW GOING TO BE INFLUENCED AT ALL ABOUT THIS MATTER?

JUROR NO. 9: NO, NOT AT ALL. I WANT TO ADD SOMETHING

THE COURT: GO AHEAD.

JUROR NO. 9: WHEN YOU GAVE US INSTRUCTIONS, YOU SAID THAT YOU'RE NOT AS STRICT AS SOME JUDGES. YOU SAID YOU CAN ACKNOWLEDGE A PERSON'S BEING THERE.

THE COURT: I MEANT BY THAT IF SOMEBODY SAYS "GOOD MORNING" TO YOU, YOU CAN SAY "GOOD MORNING." I DON'T CONSIDER THAT A CRIME.

JUROR NO. 9: AND I THOUGHT MAYBE HE COULD HAVE SOME IDEA OF HOW LONG WE HAD TO BE OUT IN THE HALL.

THE COURT: SO THAT'S ALL YOU SAID TO HIM?

JUROR NO. 9: YEAH. THAT WAS MY INTERACTION WITH HIM.

THE COURT: OKAY. YOU DIDN'T TALK ABOUT GYM EQUIPMENT OR ANYTHING?

JUROR NO. 9: I LOOK LIKE I'VE TALKED ABOUT GYM EQUIPMENT? COME NOW. THANK YOU.

THE COURT: MR. 020, YOU HEARD NONE OF THE CONVERSATION?

JUROR NO. 8: NO. I DID OVERHEAR SOME OF THE CONVERSATION.

THE COURT: YOU OVERHEARD. IS YOUR JUDGMENT AT ALL GOING TO BE AFFECTED BY ANY OF THAT?

JUROR NO. 8: NO, SIR.

THE COURT: OR MR. 007?

JUROR NO. 7: NO.

THE COURT: ONCE AGAIN, LADIES AND GENTLEMEN, I'VE SPOKEN TO DETECTIVE MUNDELL. I DON'T THINK HE'LL EVER SPEAK TO ANY JURORS EVER AGAIN IN HIS LIFETIME. BUT, ONCE AGAIN, I ADMONISH YOU THAT IN A BREAK – I MEAN WE WANT TO BE ABLE TO GIVE YOU BREAKS. WE DON'T WANT TO LOCK YOU UP. WE DON'T WANT TO SEQUESTER THE JURY OR ANYTHING LIKE THAT. BUT DURING THE COURSE OF YOUR DELIBERATIONS NOW IF YOU BREAK, IT'S YOUR DUTY YOU ARE NOT TO CONVERSE EVEN AMONG YOURSELVES OR WITH ANYONE ELSE – THAT MEANS ANYONE ELSE – ABOUT ANY SUBJECT CONNECTED WITH THE TRIAL, AND CERTAINLY YOU ARE NOT TO FORM OR EXPRESS ANY OPINION THEREON UNTIL YOU FINALLY FINISH YOUR DELIBERATIONS. ONLY IN YOUR DELIBERATIONS NOW ARE YOU SUPPOSED TO AMONG YOURSELVES SPEAK, AND, OF COURSE, FORM OPINIONS, EXERCISE YOUR OPINIONS AND GIVE YOUR OPINIONS. BUT WHILE THIS TRIAL IS GOING ON UNTIL IT COMES TO A COMPLETE END AND I TELL YOU YOU CAN SPEAK TO PEOPLE ABOUT THE CASE OR ABOUT ANYTHING ELSE, JUST DO NOT SPEAK TO ANYONE OUT IN THE HALLWAY OR

ANYPLACE ELSE, IN THE BUILDING OR OUTSIDE OR AT HOME OR ANYTHING. DO YOU UNDERSTAND THAT?

(THE JURORS ANSWERED IN THE AFFIRMATIVE.)

THE COURT: OKAY. MS. 001, YOU RAISED YOUR HAND.

JUROR NO. 1: YES. AS FOREPERSON OF THIS JURY, I WOULD LIKE TO FORMALLY APOLOGIZE TO THE COURT FOR THE MISCONDUCT BECAUSE I DID SEE IT AND I DID KNOW THAT IT WAS WRONG, AND I DID GO OVER EVENTUALLY BUT I SHOULD HAVE GONE SOONER AND TOLD THEM THEY WEREN'T ALLOWED TO TALK TO THE WITNESSES.

THE COURT: THANK YOU FOR TELLING ME YOU'RE THE FOREPERSON. NOW WE KNOW.

ALL RIGHT. I THINK EVERYBODY UNDERSTANDS NOW. IT JUST CAUSES PROBLEMS. I MEAN IT WAS REPORTED TO ME, AND IT JUST DOESN'T LOOK RIGHT, AND RIGHT AWAY WE HAVE TO INQUIRE, AND GOD FORBID NOW, SOMEBODY IS OUT IN THE HALLWAY SPEAKING TO THE JURORS ABOUT A CASE WHICH IS COMPLETELY IMPROPER. EVERYBODY SHOULD KNOW THAT. SO I THINK YOU ALL UNDERSTAND NOW. WHY DON'T YOU GO BACK AND RESUME YOUR DELIBERATIONS. THANK YOU.

JUROR NO. 5: YOUR HONOR –

THE COURT: YES, SIR, MR. 005.

JUROR NO. 5: – WE NEED THE EXHIBITS.

THE COURT: OKAY. WE'LL GET THEM BACK TO YOU.

(AT 2:55 P.M. THE JURY RETIRED TO RESUME THEIR DELIBERATIONS, AND THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: ALL RIGHT. THE JURY IS BACK IN DELIBERATION.

MS. HARROLD: YOUR HONOR, PRIOR TO MAKING AN ADDITIONAL MOTION, THERE IS ADDITIONAL EVIDENCE I WOULD LIKE THE COURT TO HEAR, AND THAT IS FROM COUNSEL TO MY RIGHT BECAUSE HE WAS PHYSICALLY STANDING THERE DURING THE PERIOD OF TIME.

THE COURT: MR. FEFFERMAN, DO YOU WANT TO OFFER SOMETHING? MR. FEFFERMAN, GO RIGHT AHEAD.

MR. FEFFERMAN: IF YOU'RE ASKING?

THE COURT: GO AHEAD.

MR. FEFFERMAN: BASICALLY I HEARD A SIMILAR CONVERSATION CONCERNING WORK, AND THERE WAS SOME COLLOQUY BACK AND FORTH BETWEEN ONE OF THE JURORS AND THE OFFICER CONCERNING WHEN HE'S HERE HIS OTHER PEERS HAVE WORK TO DO AND EACH OF THEIR WORKLOAD IS AFFECTED BY PEOPLE BEING IN COURT AND THIS, THAT AND THE OTHER.

THE COURT: BUT YOU HEARD NO CONVERSATION REGARDING THE CASE OR ANY OF THE PARTIES OR FACTS OR CIRCUMSTANCES?

MR. FEFFERMAN: NO. I DIDN'T EVEN KNOW WHO HE WAS AT THE TIME. I THOUGHT POSSIBLY AT FIRST HE WAS ANOTHER FELLOW JUROR STANDING BY THE SIDE. IN FACT, WHEN COUNSEL ASKED ME ABOUT A HALF HOUR AGO WHO OFFICER MUNDELL WAS, I DIDN'T EVEN KNOW WHO HE WAS, AND BASICALLY I SAID, "WELL, THE ONLY PERSON WHO YOU COULD POSSIBLY BE REFERRING TO IS THE MAN DRESSED IN THE BLUE SUIT." SO I DIDN'T KNOW WHO HE WAS AT THE TIME.

THE COURT: THANK YOU. ALL RIGHT.

MS. HARROLD: YES, YOUR HONOR. I AM MAKING A MOTION FOR A MISTRIAL IN REGARDS TO THE MISCONDUCT. CREDIBILITY IS ALWAYS AN ISSUE IN ANY CASE, BUT IN THIS PARTICULAR CASE THE CREDIBILITY OF OFFICER MUNDELL IS EXTREMELY CRITICAL TO THE WAY THE JURORS APPROACH THEIR TASKS AND THE ULTIMATE CONCLUSIONS THAT THEY COME TO.

WHETHER THEY ARE SPEAKING WITH HIM ON THE FACTS OF THE CASE OR ON SOMETHING ELSE IS IRRELEVANT FROM THE STANDPOINT THAT YOU HAVE JURORS WHO ARE SPEAKING WITH A CRITICAL WITNESS. THERE IS HUMANIZATION THAT'S GOING ON BETWEEN THE TWO. THEY ARE VIEWING HIM AS SOMEONE DIFFERENT THAN THE PERSON WHO WAS ON THE WITNESS STAND. IN OTHER WORDS, IF WE LOOK AT THE FACTORS THAT ARE OUTLINED IN I BELIEVE 2.20 ON CREDIBILITY, THE JURORS ARE TOLD THE VARIOUS THINGS THAT THEY CAN

CONSIDER. AND WHEN THEY ARE TALKING WITH HIM AS A PERSON AND THIS SOCIAL COLLOQUY IS GOING ON, THAT IS GOING TO HAVE AN IMPACT IN REGARDS TO WHAT IS BEING DONE.

WE HAVE AN OFFICER WHO IS TAKING ABOUT HOW HE'S OVERWORKED AND OTHER OFFICERS HAVE TO COVER FOR HIM WHEN HE'S GONE, AND WE HAVE A SITUATION WHERE PART OF THE DEFENSE IS THE FAILURE OF PROOF BECAUSE OF WHETHER YOU WANT TO SAY INCOMPETENT OR INEPTNESS OR JUST SHEER LACK OF NOT DOING THEIR WORK BY OFFICER MUNDELL. NOW HE IS GIVING EXPLANATIONS TO THE JURY IN REGARDS TO HOW MUCH WORK HE HAS TO DO, HOW OTHER PEOPLE HAVE TO COVER FOR HIM. I FIND THAT OUTRAGEOUS, AND IT WILL TO ONE DEGREE OR ANOTHER AFFECT THIS JURY. SO I AM ASKING FOR A MISTRIAL.

THE COURT: ALL RIGHT. MS. WINSTON, DO YOU WISH TO BE HEARD?

MS. WINSTON: NO, YOUR HONOR. IT APPEARS TO ME THAT THE JURORS ARE REMORSEFUL AS WELL AS UNIMPRESSED BY THAT CONVERSATION, AND SO I WOULD OBJECT TO ANY –

THE COURT: THEY HAVE ALL INDICATED MS. HARROLD, THAT THE CONVERSATIONS THAT THEY HAD WITH DETECTIVE MUNDELL WILL NOT INFLUENCE THEIR JUDGMENT IN THIS CASE AS TO MR. CALIENDO. I WILL ACCEPT THEIR REPRESENTATIONS. I ACCEPT EVERYBODY'S REPRESENTATION. I'VE HEARD NO INDICATION WHATSOEVER THAT ANYTHING ABOUT THE FACTS OF THE CASE OR ANY OF THE PARTIES IN THIS CASE

WERE DISCUSSED WHATSOEVER. I KNOW WHAT YOU'RE SAYING. IT'S A VERY UNFORTUNATE SITUATION. IT SHOULD NOT HAVE HAPPENED BUT IT DID HAPPEN. DETECTIVE MUNDELL SHOULD KNOW BETTER. HE CERTAINLY SHOULD HAVE KNOWN BETTER.

BUT I WILL ACCEPT THE JURORS AT THEIR WORD THAT THEY WILL NOT LET WHATEVER CONVERSATION THEY HAD WITH DETECTIVE MUNDELL INFLUENCE THEIR JUDGMENT IN THE CASE AS TO WHETHER OR NOT MR. CALIENDO, BASED UPON THE EVIDENCE THAT HAS BEEN INTRODUCED HERE IN COURT, IS EITHER GUILTY OR NOT GUILTY OF THESE CHARGES. SO THE MOTION FOR A MISTRIAL WILL BE DENIED. ALL RIGHT

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VAN NUYS, CALIFORNIA; FRIDAY, OCTOBER 4, 1996
10:30 A.M.

DEPARTMENT NV-C HON. CHARLES L. PEVEN, JUDGE

APPEARANCES:

THE DEFENDANT, GREGORY DEAN CALIENDO, WITH HIS COUNSEL, JOANNE HARROLD, ATTORNEY AT LAW; JANE WINSTON, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(WENDY SCHRIVER, CSR #7271, OFFICIAL REPORTER.)

* * *

WE CAN ADDRESS THE NEXT ISSUE HERE NOW, WHICH IS – LET ME GET IT HERE. IT'S HERE SOMEPLACE. THERE HAS BEEN FILED A NOTICE OF MOTION AND A MOTION FOR A NEW TRIAL, ALONG WITH ATTACHED POINTS AND AUTHORITIES. LET THE RECORD REFLECT THAT I HAVE READ AND CONSIDERED THE DOCUMENT IN ITS ENTIRETY.

DID YOU WISH TO BE HEARD?

MS. HARROLD: YES, YOUR HONOR.

THE COURT: GO AHEAD.

MS. HARROLD: THERE ARE TWO ADDITIONAL DOCUMENTS THAT I WOULD LIKE TO HAVE THE COURT CONSIDER, AND THEY GO ALONG WITH THE DECLARATION BY PAROLE OFFICER MALOY. ACTUALLY THERE ARE THREE PAGES. THE THREE

PAGES OF PRIOR TESTIMONY FROM TRIAL ONE ARE PAGE 80, PAGE 98 AND PAGE 99. AND THE REASON I'M ASKING THE COURT TO CONSIDER THOSE THREE PAGES OF TESTIMONY OF OFFICER MUNDELL, ALONG WITH THE AFFIDAVIT OF PAROLE OFFICER MALOY, RELATE TO THE CREDIBILITY OF OFFICER MUNDELL. AND THEY RELATE TO THE CREDIBILITY OF OFFICER MUNDELL FROM THE STANDPOINT O F HIM INDICATING TO THE COURT THAT HE DIDN'T REALIZE AND DIDN'T KNOW HE WASN'T SUPPOSED TO BE TALKING TO THE JURORS AND ALSO HIS STATEMENTS THAT HE WASN'T TALKING ABOUT THE CASE.

I BELIEVE, NUMBER ONE, THAT THERE IS NO POLICE OFFICER WITH EIGHT YEARS OF EXPERIENCE WHO IS GOING TO CONVINCE ME OR QUITE FRANKLY ANYONE ELSE THAT WORKS THE COURT SYSTEM THAT THEY DON'T KNOW THEY'RE NOT SUPPOSED TO BE TALKING WITH THE JURY THAT IS CONSIDERING A CASE WHERE THEY ARE THE INVESTIGATING OFFICER. QUITE FRANKLY, I FIND THAT VERY DIFFICULT TO BELIEVE.

AND ALSO, OFFICER MUNDELL'S CREDIBILITY FROM THE STANDPOINT OF WHAT HE HAS AND HAS NOT SAID IN THE PAST, IF THE COURT RECALLS, WHEN OFFICER MUNDELL WAS QUESTIONED ON THE FIRST TRIAL IN REGARDS TO A CONVERSATION WITH PAROLE OFFICER MALOY OR ANYONE ELSE ON WHETHER OR NOT OFFICER MUNDELL HAD TOLD ANYONE ABOUT MR. CALIENDO'S PRINTS BEING ALL OVER THE CAR, ALL OVER THE SPEAKERS, ALL OVER THE ROCK, ALL OVER NUMEROUS ITEMS, THAT OFFICER MUNDELL NOT ONLY FLAT-OUT DENIED EVER HAVING MADE THOSE STATEMENTS BUT BASICALLY TESTIFIED THAT IF ANYONE SAID THAT

HE SAID THAT THEY WERE A LIAR. AND WHEN I SHOWED THOSE PAGES TO PAROLE OFFICER MALOY, PAROLE OFFICER MALOY SAID, "SOMEONE IS LYING RIGHT HERE, THAT'S CORRECT, BUT THIS INFORMATION CLEARLY CAME FROM OFFICER MUNDELL. HE'S THE ONE THAT TOLD ME THAT WITHIN A COUPLE OF DAYS OF MR. CALIENDO'S ARREST."

SO FROM THE STANDPOINT OF CREDIBILITY, I'M SORRY, I DON'T BELIEVE OFFICER MUNDELL WHEN HE TELLS THIS COURT QUITE FRANKLY THAT HE DIDN'T REALIZE HE WASN'T SUPPOSED TO BE TALKING TO THIS JURY. AND FROM THE STANDPOINT OF NOT –

THE COURT: WAIT ONE SECOND. LET'S JUST HAVE THE JURORS GO BACK.

(THE JURORS IN AN UNRELATED CASE RE-ENTERED THE COURTROOM TO RESUME THEIR DELIBERATIONS IN THE JURY ROOM.)

THE COURT: ALL RIGHT. I'M SORRY. GO AHEAD.

MS. HARROLD: FROM THE STANDPOINT OF WHETHER OR NOT WHAT OFFICER MUNDELL HAD TO SAY TO THIS JURY INVOLVED THE CASE, I BELIEVE IT DOES INVOLVE THE CASE BECAUSE, AS THE COURT MAY RECALL, OFFICER MUNDELL WAS ATTACKED BY THE DEFENSE NOT ONLY FROM THE STANDPOINT OF CREDIBILITY BUT ALSO FROM THE STANDPOINT OF HIS INCOMPETENCE OR INEPTNESS, OR WHATEVER YOU WANT TO SAY, IN REGARDS TO TRYING TO GET FINGERPRINTS FROM A VAN THREE MONTHS LATER WHEN IT HAD BEEN RELEASED TO THE VICTIM RIGHT AFTERWARDS.

WHEN OFFICER MUNDELL IS SITTING THERE TELLING THE JURORS THAT HE'S OVERWORKED, OTHER OFFICERS HAVE TO COVER FOR HIM WHILE HE IS HERE IN COURT, HE IS CLEARLY EXPLAINING INFERENTIALLY, IF NOT SPECIFICALLY, WHY HE DIDN'T DO A LOT OF THE THINGS THAT HE DIDN'T DO ON THIS PARTICULAR CASE AND WHY IT TOOK HIM THREE MONTHS BEFORE ANYTHING WAS DONE ON THIS PARTICULAR CASE, CLEARLY ATTEMPTING TO JUSTIFY HIS WAITING TO DO SOMETHING ON THIS PARTICULAR CASE. I THINK IT GOES RIGHT TO THE HEART QUITE FRANKLY OF OFFICER MUNDELL'S TESTIMONY.

THIS IS NOT AND WAS NOT A CUT AND DRY CASE. THIS WAS A CASE THAT ON THE FIRST TRIAL HAD RESULTED IN A HUNG JURY, SEVEN-FIVE, SEVEN FOR NOT GUILTY, FIVE FOR GUILTY. ON THE SECOND TRIAL THE JURY WENT OUT I BELIEVE ON A THURSDAY THAT WAS JUST PRIOR TO LUNCH. THEY WERE OUT THURSDAY. THEY WERE OUT FRIDAY. THEY CAME BACK MONDAY PRIOR TO NOON WITH A VERDICT. SO CLEARLY THIS WAS NOT A CUT AND DRY TYPE OF A CASE WHERE THERE WAS SUBSTANTIAL OVERWHELMING EVIDENCE. SO VERY LITTLE IS REQUIRED QUITE FRANKLY TO SWING THE BALANCE ONE WAY OR THE OTHER.

AND WHEN YOU HAVE A POLICE OFFICER WHO IS MAKING EXCUSES TO A JURY IN REGARDS TO CERTAIN THINGS, QUITE FRANKLY I THINK THAT IS OUTRAGEOUS, AND I THINK HIS ANSWER TO THE COURT WAS NOT HONEST. I THINK HIS UNANSWER, HIS NOT ANSWERING THE COURT WHEN THE COURT ASKED OFFICER MUNDELL AND SAID, "OFFICER MUNDELL, QUITE FRANKLY I DON'T UNDERSTAND WHY YOU'RE HERE." HE DIDN'T ANSWER THE

COURT BECAUSE THERE WAS NO REASON FOR HIM TO BE HERE. HE FINISHED HIS PART OF THE CASE ON WEDNESDAY. WEDNESDAY THE DISTRICT ATTORNEY MADE HER OPENING ARGUMENT. THURSDAY MORNING I ARGUED AND MS. WINSTON FINISHED HER REBUTTAL.

THERE WAS NO REASON FOR THAT OFFICER TO BE BACK HERE ON THURSDAY. THERE WAS NO REASON FOR HIM, EVEN IF HE WAS INTERESTED IN THE ARGUMENTS, NOT TO HAVE LEFT THE COURTHOUSE WHEN THE ARGUMENTS WERE OVER, WHICH WAS AGAIN PRIOR TO LUNCH. BUT INSTEAD HE STUCK AROUND AND STOOD OUTSIDE THIS COURTROOM DOOR AND WAS THERE WAITING WHEN THE JURY CAME UP, WAITING TO GET BACK IN THE COURT.

WHEN I CALLED FOR MS. WINSTON AND ASKED HER TO COME UP, SHE ASKED HIM, "WHAT WAS THE PROBLEM?" SHE WAS SHOCKED QUITE FRANKLY THAT DETECTIVE MUNDELL WAS EVEN HERE. SO IT TELLS ME THAT THE D.A. DIDN'T ASK HIM TO BE HERE. HE DIDN'T HAVE ANY OTHER CASE TO TESTIFY ON. THERE WAS ABSOLUTELY NO REASON FOR HIM TO BE OUTSIDE OF THIS COURTROOM IN CONTACT AND IN A POSITION OF WHERE HE WAS TO HAVE CONTACT WITH THESE JURORS, AND THAT'S EXACTLY WHAT HAPPENED.

AND THE CASE THAT I CITED IN THE BRIEF – I BELIEVE IT'S THE REINER CASE – THAT DEALS WITH WHETHER OR NOT IT WAS PREJUDICIAL, CLEARLY IT WAS MISCONDUCT. THE CONDUCT WAS SIMILAR FROM THE STANDPOINT OF A POLICE OFFICER HAVING CONTACT WITH THE JURORS. IT WAS VERY DISSIMILAR FROM THE STANDPOINT THAT THE

OFFICER IN REINER HAD A VERY VALID PURPOSE FOR STILL BEING HERE. PROCEEDINGS WERE STILL GOING ON. HE HAD NOT BEEN EXCUSED. HE WAS STILL IN THE PARAMETERS OF BEING A WITNESS. SO INNOCENT TYPE THINGS LIKE THAT CAN HAPPEN. THERE IS ONLY SO MUCH SPACE IN A COURTHOUSE.

BUT IN REINER, EVEN WITH OVERWHELMING EVIDENCE, SIX EYEWITNESSES, TWO OTHER OFFICERS WHO TESTIFIED TO THE EXACT SAME THING AS THE OFFENDING OFFICER, LET'S SAY, THE COURT STILL FOUND THAT IT WAS MISCONDUCT, AND THEY LOOKED TO THE REST OF THE CASE TO SEE WHETHER OR NOT IT WAS PREJUDICIAL. AND THE ONLY REASON IN REINER QUITE FRANKLY THAT THEY FOUND THAT IT WAS NOT PREJUDICIAL MISCONDUCT AND WOULD HAVE REVERSED IT WAS BECAUSE OF THE OVERWHELMING STRONG EVIDENCE. BUT AS I'M SAYING, EVEN THOUGH THEY FOUND IT NOT PREJUDICIAL, IT WAS STILL MISCONDUCT.

HERE IN THIS PARTICULAR CASE WE HAVE THE MISCONDUCT, AND CLEARLY I BELIEVE IT WAS PREJUDICIAL BECAUSE THE ONLY DIFFERENCE QUITE FRANKLY IN THE DISTRICT ATTORNEY'S CASE BETWEEN WHAT WAS PRESENTED TO THE SECOND JURY AND THE FIRST JURY WAS THE TESTIMONY OF OFFICER MUNDELL ON THE CONVERSATION WITH THE DEFENDANT. THERE WAS NO OTHER CORROBORATION OF THIS CONVERSATION BETWEEN THE DEFENDANT AND OFFICER MUNDELL THAT SUPPOSEDLY TOOK PLACE. THERE WAS NO TAPE RECORDING, NO VIDEOTAPE – VIDEO RECORD. THERE WAS NO FORM FILLED OUT. THERE WASN'T EVEN A WRITTEN FORM OF WAIVER OF RIGHTS THAT WAS DONE IN THIS PARTICULAR CASE, ALTHOUGH

DETECTIVE MUNDELL INDICATED THAT HE WAS AWARE OF ALL OF THOSE ITEMS BEING AVAILABLE, THAT OTHER OFFICERS USED THOSE PARTICULAR ITEMS BUT HE CHOSE NOT TO.

SO I THINK THAT WHEN THE COURT COMPARES THE EVIDENCE IN THIS PARTICULAR CASE, IT DOESN'T COME ANYWHERE CLOSE TO WHAT THE APPELLATE COURT WAS DEALING WITH IN REINER. THE IMPORTANCE OF REINER IS THAT WE HAVE THE MISCONDUCT. THE DIFFERENCE IS THE STRENGTH OF THE PROSECUTION'S CASE IN REINER AS COMPARED TO WHAT WE HAD IN THIS PARTICULAR CASE.

WHEN WE LOOK AT A COUPLE OF THE OTHER AREAS THAT I CITED IN THE BRIEF IN REGARDS TO THE CONDUCT WE HAVE A SITUATION OF WHERE, AGAIN, MUNDELL TESTIFIES THAT MR. CALIENDO SAID HE BROKE INTO THE CAR. OFFICER OKIMOTO AND OFFICER STAIRS INDICATED IN THEIR REPORT AT THE TIME THAT THE DEFENDANT DENIED BREAKING INTO THE VEHICLE. CLEARLY TWO CONFLICTING STATEMENTS. TO HAVE ALLOWED THE TESTIMONY OF DETECTIVE MUNDELL IN FRONT OF THE JURY WITHOUT ALLOWING THE OPPOSITE, THE CONFLICTING EVIDENCE IN FRONT OF THE JURY, THAT ALSO WOULD HAVE AN IMPACT IN REGARDS TO THE JURY NOT HEARING ANOTHER PORTION. THAT I BELIEVE ALSO CONTRIBUTED IN PART TO THE JURY'S FINDING OF GUILT.

AND THEN WHEN I ATTEMPTED TO QUESTION AND SPEAK WITH THE JURORS AT THE CONCLUSION OF THEM BEING EXCUSED, RIGHT AT THE VERY ONSET MS. WINSTON INFORMED THE JURY THAT WE'RE DEALING WITH A DANGEROUS THIRD STRIKER

WHO HAD THREATENED WITNESSES IN THE PAST. I DISAGREE WITH A PROSECUTOR GIVING INFORMATION TO THE JURY THAT HAS BEEN KEPT FROM THEM. I BELIEVE IT BIASES AND PREJUDICES FUTURE JURORS. IT ALSO PREVENTS POSSIBLY – AND THIS IS SPECULATION BUT I THINK IT'S GOOD SPECULATION – IT PREVENTS THE DEFENSE FROM BEING ABLE TO FIND OUT IF THERE WAS ANY OTHER TYPE OF MISCONDUCT BY THE JURORS, BECAUSE ONCE A JURY IS INFORMED THAT THIS IS , QUOTE, "A DANGEROUS INDIVIDUAL WHO'S THREATENED WITNESSES," THIS TYPE OF A THING, THEY ARE NOT GOING TO BE INCLINED TO BE AS OPEN AND DISCUSS THINGS WITH YOU AS THEY WOULD HAVE HAD THIS BEEN KEPT FROM THEM.

AND I THINK WHEN YOU LOOK AT THE RULES OF PROFESSIONAL CONDUCT, IT IS UNPERMISSIBLE FOR ANY ATTORNEY TO GIVE INFORMATION TO JURORS WHICH COULD INFLUENCE THEM IN THE FUTURE, AND QUITE FRANKLY I THINK THAT WHEN A PROSECUTOR TELLS A JURY THAT THIS PERSON HAS ALL OF THESE PRIORS THAT'S GOING TO AFFECT THAT JURY, JUST LIKE AS IF THE PROSECUTOR TOLD THE JURY ABOUT EVIDENCE THAT HAD BEEN SUPPRESSED OR EXCLUDED BY THE COURT.

AND WHEN WE'RE DEALING WITH JURORS WHO ON A ROUTINE BASIS AT LEAST RECEIVE A CALL FOR JURY DUTY EVERY YEAR AND MANY PEOPLE SERVE JURY DUTY EVERY TWO YEARS, THREE YEARS, SOMETHING ALONG THAT NATURE, AND TWO OF THE JURORS INDICATED TO ME THAT YES, KNOWING THAT ABOUT A PERSON WILL INFLUENCE THEM IN THE FUTURE FROM THE STANDPOINT OF FUTURE JURY SERVICE, NOW, WHETHER OR NOT THOSE JURORS WHEN THEY ARE CALLED BACK – AND I'M

SURE THEY WILL BE AT SOME POINT IN THE FUTURE – WHETHER OR NOT THEY WILL TELL THE COURT AND COUNSEL THAT THEY ARE BIASED BY WHAT HAPPENED IN THE LAST TRIAL, I DON'T KNOW. BUT I THINK THAT WHEN YOU LOOK AT THE RULES OF PROFESSIONAL CONDUCT THAT A PROSECUTOR SHOULD NOT BE ALLOWED TO GIVE THAT TYPE OF INFORMATION.

WHY WOULD A DEFENSE BIFURCATE AND WAIVE JURY ON THOSE PRIORS? I MEAN IF THE JURY IS GOING TO GET THAT INFORMATION ANYWAY, THEN WHY NOT JUST TRY IT TO THE JURY? BIFURCATE – AND I UNDERSTAND. BUT WHY NOT JUST GO AHEAD AND TRY IT TO THE JURY, ESPECIALLY ON A THIRD STRIKE CASE WHERE YOU WOULD HAVE NOTHING TO LOSE TO TRY IT? MAYBE THEY WOULD FEEL SOME GUILT IN REGARDS TO FINDING GUILTY ON A VERY WEAK CASE AND HANG UP ON THE PRIORS, FIND THE PRIORS NOT TO BE TRUE.

BUT I THINK THAT THERE IS A VERY VALID CONCERN ABOUT NOT POISONING JURY POOLS. WE HAVE ENOUGH PROBLEMS WITH WHAT THE MEDIA DOES AND THE NEWSPAPERS AND THE RADIO AND THE TELEVISION WITHOUT HAVING THE ATTORNEYS – AND I BELIEVE THAT THE DEFENSE QUITE FRANKLY IS JUST AS GUILTY AS THE PROSECUTION IN MANY INSTANCES OF ATTEMPTING TO INFLUENCE AND POISON FUTURE JURORS. BUT IN THIS PARTICULAR CASE I THINK THAT TO TELL THE JURY THAT WE'RE DEALING WITH A THIRD STRIKER WHO IS DANGEROUS AND ALL OF THAT, KNOWING THAT WE'VE ALREADY HAD A MOTION FOR A MISTRIAL DURING JURY DELIBERATIONS BECAUSE OF

POSSIBLE MISCONDUCT, I THINK THAT IS UNPERMISSIBLE.

SO WHAT I'M ASKING THE COURT TO DO IN REGARDS TO THIS CASE IS TO STEP BACK, LOOK AT THE FIRST CASE, THE FIRST TRIAL, WHAT HAPPENED WITH THE JURY, LOOK AT THE SECOND CASE, WHAT HAPPENED WITH THAT JURY, THE LENGTH OF TIME THAT THE JURY WAS OUT, THE NUMEROUS QUESTIONS AND TESTIMONY REREADS THAT WERE ASKED BY THE SECOND JURY – I DON'T KNOW ABOUT THE FIRST JURY BUT I KNOW THAT THEY DID ASK FOR SOME TESTIMONY. I KNOW THAT THEY DID ASK FOR SOME QUESTIONS. THERE WERE DIFFERENT QUESTIONS THAN THIS JURY HAD, AND EVEN THAT WAS AFTER THE CONTACT WITH OFFICER MUNDELL.

WE EVEN HAD THE JURY FOREMAN VOLUNTEERING TO THE COURT AND SAYING, "YOUR HONOR, I WANT TO APOLOGIZE FOR THE JURY. I KNOW THAT WHAT THESE JURORS WERE DOING WAS WRONG IN TALKING WITH THE OFFICER, AND I SHOULD HAVE WENT OVER THERE AND SAID SOMETHING TO THEM, THAT THEY SHOULDN'T BE DOING THAT." SO YOU EVEN HAVE A JUROR WHO KNOWS THAT SHE AND THE OTHER JURORS ARE NOT SUPPOSED TO BE TALKING WITH WITNESSES, BUT YET THE POLICE OFFICER, THE INVESTIGATING OFFICER, THE MAN WHO IS SITTING HERE THE WHOLE TIME FROM THE END OF VOIR DIRE THROUGH OPENING STATEMENT, TESTIMONY, CLOSING STATEMENT, CASE SUBMITTED TO THE JURY, AND HE'S STILL HANGING AROUND SAYING, "I DIDN'T KNOW."

I ASK THE COURT TO FOLLOW THE LAW LAID DOWN IN REINER AND THE ANALYSIS THAT THE

APPELLATE COURT DID AND UNDERTOOK IN REINER IN REGARDS TO WHY WE HAD MISCONDUCT AND WHY IT'S REVERSIBLE AND PREJUDICIAL TO THE DEFENDANT, AND I WOULD ASK THAT THE COURT GRANT THE MOTION FOR A NEW TRIAL.

THE COURT: MS. WINSTON.

MS. WINSTON: YOUR HONOR, I WOULD JUST LIKE TO SPEAK TO A FEW THINGS. I THINK IT'S INAPPROPRIATE FOR COUNSEL TO ARGUE ANYTHING HAVING TO DO WITH THE PROBATION OFFICER OR PAROLE OFFICER WHO DID NOT TESTIFY IN THIS CASE. IF HE HAD TESTIMONY THAT WOULD HAVE BEEN HELPFUL TO THE DEFENSE, SHE WOULD HAVE CALLED HIM TO THE STAND. I DIDN'T SEE HIM HERE. I THINK IT'S INAPPROPRIATE TO ARGUE WHATEVER HAPPENED IN THE FIRST TRIAL AS TO ANYTHING HAVING TO DO WITH THIS JURY, AND SO I WOULD ASK THE COURT NOT TO TAKE ANYTHING FROM THOSE ARGUMENTS.

AS TO THE MISCONDUCT OF DETECTIVE MUNDELL, THE COURT THOROUGHLY WENT INTO THAT WITH THE JURY WITH HIM, DID AN IN-DEPTH INTERVIEW OF EVERY PERSON INVOLVED IN IT. WHETHER SHE BELIEVES HE KNEW ABOUT IT OR NOT, HE INDICATED THAT HE WAS UNAWARE THAT HE COULDN'T TALK TO THEM ABOUT THAT. HE KNEW HE COULDN'T TALK TO THEM ABOUT THE CASE BUT HE INDICATED HE DIDN'T WANT TO BE RUDE TO THEM. I TOLD HIM AT THE END OF THE CASE THAT HE COULD GO NOW. HE SAID HE WAS GOING TO HANG AROUND IN CASE THE VERDICT CAME IN, AND HE HAD SOME FRIEND THAT HE WAS GOING TO HANG WITH. I DON'T THINK HE CAME HERE WITH THE INTENTION OF INFLUENCING

ANYBODY, AND I THINK THAT IS AN UNFAIR ALLEGATION TO MAKE AS TO THE DETECTIVE.

AS TO HIS CREDIBILITY, THE JURY HAD EVERY OPPORTUNITY TO JUDGE HIS CREDIBILITY BEFORE THEY CAME TO THEIR CONCLUSION IN THIS CASE, AND I WOULD REMIND THE COURT THAT THE SO-CALLED MISCONDUCT IN THIS CASE OCCURRED EVEN BEFORE THE JURY HAD ONE MOMENT OF DELIBERATION GOING ON, AND THEN THAT JURY WENT IN AND DELIBERATED FOR TWO AND A HALF DAYS, OBVIOUSLY NOT INFLUENCED ONE WAY OR THE OTHER BY WHATEVER HAPPENED THOSE FEW MOMENTS OUTSIDE THE COURTROOM WITH DETECTIVE MUNDELL.

AS A MATTER OF FACT, THE JURY TOLD ME THAT IF THEY EVER WERE ARRESTED IN A CASE, THEY HOPED THAT THEY WOULD HAVE A JURY THAT TOOK THIS CASE AS SERIOUSLY AND WENT INTO IT IN EVERY DETAIL AS THEY DID IN THIS CASE, TRYING TO GIVE THE BENEFIT OF DOUBT TO THE DEFENDANT EVERY WHICH WAY THEY COULD, AND THEY COULDN'T DO IT AND CAME TO THE CONCLUSION THAT THERE WAS ONLY ONE VERDICT FOR THEM TO MAKE AT THAT TIME. SO I THINK THAT ANY PREJUDICE TO THE DEFENDANT WAS DEALT WITH AND DISMISSED AT THE TIME THAT THE COURT DID THE INTERVIEW OF THE JURY.

AS TO MY SPEAKING TO THE JURORS OUTSIDE THE COURTROOM, THE VERDICT HAD BEEN RECORDED. THE CASE WAS FINISHED. THE JURY WAS DISCHARGED. THEY ASKED ME WHAT HIS RECORD WAS. I TOLD THEM. THEY HAVE A RIGHT TO IT. IT'S PUBLIC KNOWLEDGE. THEY CAN COME TO THE SENTENCING. THEY CAN LOOK AT THE

PROBATION REPORT. SO THERE IS NOTHING THAT I CAN DO TO PREVENT THEM FROM FINDING THAT OUT. IF THEY ASK THE QUESTION, I ANSWER IT. SO I DON'T BELIEVE THERE IS ANYTHING IN THE RULES OF CONDUCT THAT WOULD BE UNETHICAL IN TERMS OF ANSWERING JURORS' QUESTIONS. I HAVE DONE IT IN THE PAST, AS HAVE MANY DISTRICT ATTORNEYS, AS MY RESEARCH HAS INDICATED. SO I DON'T BELIEVE THAT IS A VALID GROUND FOR A MOTION FOR A NEW TRIAL, AND I HAVEN'T HEARD ANYTHING HERE THAT WOULD FIT UNDER THE PENAL CODE UNDER A MOTION FOR A NEW TRIAL OR GRANTING A TRIAL THAT'S NEW. THANK YOU.

THE COURT: ALL RIGHT. AS I INDICATED AT THE TIME OF THE INCIDENT WITH INVESTIGATOR MUNDELL AND THE JURY – MS. HARROLD YOU'VE BEEN AROUND THE COURTS A LONG TIME. MS. WINSTON HAS BEEN AROUND THE COURTS A LONG TIME. I CERTAINLY HAVE BEEN AROUND THE COURTS A LONG TIME. I'VE BEEN ON THE BENCH NOW MANY YEARS, HANDLED MANY TRIALS, INVOLVED IN MANY, MANY TRIALS OVER THE YEARS, DEALT WITH MANY, MANY CRIMINAL CASES WITH INVESTIGATING OFFICERS. THIS IS THE FIRST INSTANCE THAT I EVER WAS AWARE OF THAT AN INVESTIGATOR WOULD BE I GUESS DUMB ENOUGH TO STAND OUT IN THE HALLWAY AND GET HIMSELF IN A SITUATION WHERE HE WAS CONVERSING WITH JURORS.

WHEN IT WAS BROUGHT TO MY ATTENTION AT THE TIME I WAS CERTAINLY UPSET, AS WERE WE ALL, AND IT WAS AN UNHEARD-OF SITUATION. I TRIED TO HANDLE IT THE BEST THAT I COULD, ADMONISHING THE OFFICER, INQUIRING OF HIM WHAT THE SUBJECT OF THE CONVERSATION WAS,

WHY HE WAS HERE, WHY HE WAS SPEAKING TO THE JURORS, WHAT HE HAD SAID TO THE JURORS, HOW MANY JURORS HAD HE SPOKEN TO AND SO FORTH, AND WE GOT HIS EXPLANATION AND HIS STATEMENTS THAT HE HAD NOT DISCUSSED ANY OF THE ISSUES OF THE CASE AND THE PEOPLE INVOLVED IN THE CASE, HE DID NOT DISCUSS ANYTHING ABOUT THE CASE WITH THE JURORS. HE WAS MERELY SIMPLY TALKING SMALL TALK, BASEBALL, HIS WORKLOAD, THINGS OF THIS NATURE. I DON'T KNOW WHY HE WAS DOING THAT, I DON'T KNOW, BUT HE WAS.

ALL RIGHT. I'VE MADE THE BEST EFFORTS I COULD TO DISCUSS THIS WITH THE JURORS AND INQUIRED OF ALL THE JURORS WHO HAD SPOKEN TO MR. MUNDELL, WHO HAD OVERHEARD ANY CONVERSATION WITH MR. MUNDELL, HAD THERE BEEN ANY KIND OF STATEMENT AS TO ANY CONVERSATION WHATSOEVER REGARDING ANY OF THE JURORS WITH OFFICER MUNDELL REGARDING ANYTHING ABOUT THIS CASE, AND ALL THE JURORS INDICATED IN THE NEGATIVE THAT THERE HAD BEEN NO SUCH DISCUSSION, AND THEY CONFIRMED THEMSELVES THAT THE CONVERSATION WAS ABOUT THE SHERIFF'S WORKLOAD AND BASEBALL, SPORTS, WHATEVER IT IS THAT THE JURORS HAD TO SAY. IT'S ON THE RECORD.

I ASKED ALL OF THE JURORS TO THE BEST I COULD IS THIS GOING TO INFLUENCE THEM IN ANY WAY, IF THEY HAD THE CONVERSATION WITH DETECTIVE MUNDELL OUT IN THE HALLWAY, THAT WOULD CAUSE THEM TO GIVE LESS WEIGHT TO HIS TESTIMONY AND IS IT GOING TO AFFECT THEIR JUDGMENT IN ANY WAY, AND THEY ALL ANSWERED IN THE NEGATIVE. I DENIED YOUR MOTION FOR A

MISTRIAL AT THE TIME. I LET THE JURY GO AND DELIBERATE. THE JURY DID DELIBERATE. AS-I POINTED OUT TO YOU BOTH HERE NOW, THEY DELIBERATED QUITE SOME PERIOD OF TIME. THEY DELIBERATED IN THREE DIFFERENT DAYS. THEY HAD READ-BACK OF TESTIMONY. THEY HEARD IT. IT WAS A VERY CONSCIENTIOUS JURY. THEY APPARENTLY WORKED VERY HARD AND THEY REACHED A VERDICT, AND THE VERDICT IS, OF COURSE, ADVERSE TO YOUR CLIENT, WITH THE VERDICT OF GUILTY.

THE DETECTIVE'S CONDUCT WAS UNFORTUNATE, INAPPROPRIATE. IT WAS, I BELIEVE, MISCONDUCT ON BEHALF OF THE DETECTIVE THAT HE SHOULD NOT HAVE GOTTEN HIMSELF IN THAT SITUATION. HE SHOULD NOT HAVE SPOKEN TO THOSE PEOPLE. AND I RECOGNIZE THE REINER CASE. I'VE READ THE REINER CASE. I'M AWARE OF THE REINER CASE. I'M AWARE OF THE SITUATION THERE. I SUPPOSE IT'S MISCONDUCT ON THE PART OF THE JURORS ALSO TO HAVE BEEN SPEAKING TO MUNDELL, THOSE OF THE JURORS THAT DID SPEAK TO MUNDELL, BECAUSE THAT'S A VIOLATION I SUPPOSE TECHNICALLY OF THE ADMONITION I HAD GIVEN THEM A NUMBER OF TIMES AND ALL THROUGH THE COURSE OF THE TRIAL, THAT THEY WERE NOT TO CONVERSE AMONG THEMSELVES OR WITH ANYONE ELSE ON ANY SUBJECT CONNECTED WITH THE TRIAL, THEY WEREN'T TO EXPRESS OR FORM ANY OPINIONS, AND SO FORTH. THEY SHOULD NOT HAVE BEEN IN THE POSITION WHERE THEY WERE SPEAKING WITH THE WITNESS IN THE CASE. HOWEVER, I SUPPOSE IN THEIR MINDS THEY WERE NOT DISCUSSING ANY SUBJECTS CONNECTED WITH THE TRIAL. THEY WEREN'T FORMING OR EXPRESSING ANY OPINION. THEY THOUGHT THEIR

CONTACT WITH MUNDELL WAS INNOCUOUS. THEY WERE TALKING ABOUT OTHER MATTERS.

AND SO AS I SAY, I DENIED YOUR MOTION FOR A MISTRIAL AT THAT TIME, AND ON THAT GROUND I'M ALSO GOING TO DENY YOUR MOTION FOR A NEW TRIAL. I FEEL THAT THE JURY WAS – I TAKE THEM AT WHAT THEY SAID. I TAKE THEIR WORD, THEY WERE NOT INFLUENCED BY THAT BRIEF CONVERSATION THAT THEY MIGHT HAVE HAD WITH MUNDELL IN THE HALLWAY ABOUT MATTERS OUTSIDE OF THIS TRIAL AND IT DID NOT INFLUENCE THEIR VERDICT AT ALL. SO I'M GO TO DENY YOUR MOTION ON THAT GROUND.

INSOFAR AS THE OTHER GROUND THAT YOU'VE STATED, I'M GOING TO DENY YOUR MOTION. I BELIEVE THE RULING I MADE INSOFAR AS THE TESTIMONY THAT WAS OR WAS NOT ALLOWED IN WERE PROPER RULINGS. IF THE APPELLATE COURT DISAGREES WITH ME, SO BE IT. BUT THE MOTION FOR A NEW TRIAL WILL BE DENIED.

INSOFAR AS MS. WINSTON SPEAKING TO THE JURORS OUTSIDE THE HALLWAY, I HAD RELIEVED THE JURY OF ITS ADMONITION ONCE THE VERDICT WAS IN, THE VERDICT WAS RECORDED. I CAN'T CONTROL WHAT COUNSEL – COUNSEL KNOW WHAT THEIR OBLIGATIONS ARE. COUNSEL KNOW WHAT THEY CAN OR CANNOT SAY TO PEOPLE OUTSIDE OF COURT AND OUTSIDE OF A TRIAL SITUATION. I CAN'T SAY WHETHER IT'S A WISE THING OR NOT A WISE THING TO DO, TO TALK TO JURORS ABOUT MATTERS OUTSIDE OF A TRIAL SITUATION AFTER A VERDICT IS IN, TALK ABOUT THE DEFENDANT'S RECORDS OR OTHER INFORMATION THAT THE PROSECUTOR MIGHT BE PRIVY TO OR DEFENSE

COUNSEL, AS YOU MENTIONED, MIGHT BE PRIVY TO COUNSEL TALKING TO THE JURY AFTER HIS TRIAL—THINGS ARE KEPT FROM JURORS, THE EVIDENCE IS KEPT OUT, RULINGS ARE MADE, LAWYERS ARE AWARE OF CERTAIN THINGS.

SOMETIMES JURIES ARE CURIOUS ABOUT CERTAIN THINGS AND THEY HAVE QUESTIONS OF LAWYERS AND THE LAWYERS ANSWER THEM AND SO FORTH. WHETHER THAT'S A WISE THING TO DO OR NOT, THERE APPEARS TO BE NO PARTICULAR PROHIBITION AGAINST IT. I THINK LAWYERS HAVE TO BE GUIDED BY THEIR OWN COMMON SENSE AND GOOD WILL, AND UNDERSTANDING THAT AS OFFICERS OF THE COURT THEY ARE NOT TO TRY TO UNDULY INFLUENCE PEOPLE OR DO ANYTHING OF THAT NATURE.

I'M NOT GOING TO TAKE A POSITION AS TO MS. WINSTON AND HER PRACTICES AND MAYBE OTHER DISTRICT ATTORNEYS PRACTICES, THAT THEY ARE NOT TO TALK TO JURORS AFTER A VERDICT, TALK ABOUT THEIR RECORD, IF ASKED, AND MS. WINSTON SAYS SHE WAS ASKED AND I'M NOT GOING TO TAKE A POSITION ON THAT. I DON'T THINK IT'S SOMETHING FOR ME TO RULE ON ONE WAY OR THE OTHER. IF ANYBODY FEELS THAT WHAT SHE HAS DONE IS IMPROPER, IS A VIOLATION OF THE CANONS OF ETHICS AND SO FORTH, THEN I SUPPOSE IF SOMEBODY FEELS STRONGLY ABOUT THAT THEY COULD BRING THAT UP TO THE STATE BAR. IF THE STATE BAR WANTS TO DO ANYTHING, THEY'LL DO IT. MS. WINSTON WILL HAVE TO DEAL WITH THAT. I'M NOT SUGGESTING THAT THAT'S GOING TO HAPPEN OR THAT THEY WILL DO ANYTHING. I'M JUST SAYING THAT IT'S NOT A MATTER THAT I HAVE TO RULE ON AT THIS POINT AND DEAL WITH

BECAUSE IT DID NOT AFFECT THE VERDICT AND IT HAS NOTHING TO DO WITH HOW THIS TRIAL WAS CONDUCTED. SO ON THE GROUNDS YOU'VE STATED, MS. HARROLD, I AM GOING TO DENY YOUR MOTION FOR A NEW TRIAL.

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